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Comments of the United States of America  
on the Draft Report of the Working Group on the elaboration of a  
draft legally binding instrument on protection from  
Enforced Disappearances

We have reviewed the draft Forced Disappearances Report covering the third session of negotiations held from October 4-8, 2004 and the fourth session held from January 31-February 11, 2005. The following are our comments on this draft:

CRITICAL COMMENTS:

Article 9: The Chair and the Secretariat staff promised the US delegation during negotiations that the final Report would state clearly that one delegation continued to oppose the inclusion of Article 9(2) on "found in" (quasi-universal) jurisdiction. The draft Report does not state this. Please ensure that the final Report expressly includes mention of this opposition of one delegation to Article 9(2).

Article 5: The Report should reflect that at least one delegation believes that there should not be an operative provision in the instrument text on crimes against humanity.

Process: The final Report should include reference to the status of the negotiations at the conclusion of the Fourth session; in particular the following:

(1) the Chair's statement on the final day of the Fourth session that several aspects of the treaty text remain subject to lively debate within the Working Group, including (a) state action, (b) the whole of Part II, Article III- Dbis on "responsibility for international relations", and (c) the format and structure of the instrument (i.e., whether it is an optional protocol or convention, and whether it will use an existing or new treaty monitoring body); and

(2) while many states intervened to applaud the skill of the Chair and his team, several States added on the last day of the fourth session that the text of the instrument was not yet mature, that consensus was desirable and not reached, and that the 61st CHR should authorize additional treaty negotiations.

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Additional comments:

Article 19: Paragraph 16 in the Report under Article 19 should reflect that at least one delegation underscored that Article 19, as well as similar criminalization provisions, should contain an express requirement of intentionality or knowledge.

Article 22: Paragraph 11 in the Report under Article 22 inaccurately indicates that the proposed Principles and Guidelines on Right to a Remedy contain "obligatory" provisions. Rather, these Principles by their terms (and expressly stated therein) are non-binding. Thus the second sentence in paragraph 11 under Article 22 should be corrected to read as follows: "Other kinds of reparation were just as important to victims' families, and should therefore be treated on a par with compensation in keeping with the Principles and Guidelines on Right to a Remedy currently being worked on at the United Nations."

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